

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SOMSACK INTHIRATH

Claimant

VS.

FARMLAND FOODS, INC.

Respondent

AND

SAFETY NAT'L CASUALTY CORP.

Insurance Carrier

Docket No. **1,060,395**

ORDER

Respondent and its insurance carrier (respondent) requests review of the June 4, 2012 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found that claimant sustained personal injuries to his back while working for respondent. The ALJ was persuaded by the testimony of claimant and the medical opinions of Dr. C. Reiff Brown. Temporary total disability benefits and medical treatment were awarded.

Respondent argues claimant did not prove that he sustained personal injury by accident arising out of and in the course of his employment. Specifically, respondent maintains claimant failed to prove that there was a causal connection between his alleged accident and the conditions under which claimant's work was required to be performed. Respondent also claims the evidence does not establish that claimant's alleged accident was the prevailing factor in causing the injury, medical condition, and resulting disability or impairment.

Claimant argues that the ALJ's Order should be affirmed in all respects.

The sole issue presented for the Board's consideration is whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member makes the following findings of fact:

Claimant, who is 61 years old, worked for respondent for about 8 years as a repair machinist/mechanic. On December 29, 2011, claimant suffered injury to his back after lifting an electric motor in the process of setting up a pump. He testified that as he lifted the motor he felt what he described as an icy sensation in the middle of his back. He testified that the electric motor weighed over 150 pounds.

Claimant's supervisor, Robert Bonds, Jr., was working with him at the time of the accident. Claimant testified that he reported the sensation in his back to Mr. Bonds by jokingly asking him if he had put some ice on his back.¹ According to claimant, Mr. Bonds responded by stating that he would not joke with him. Claimant continued to work the rest of the day. Because of the holidays, claimant did not work on December 30, 2011, and returned to work on January 3, 2012.

When claimant returned to work on January 3, 2012, he continued to perform his regular duties and, in the process of lifting the same motor again, he felt the same sensation in his back, although it was lower in his back than before. The next day, January 4, 2012, claimant continued to work and the pain radiated down into his right leg.

Claimant testified he set up another pump on January 6, 2012, and went to the emergency department at Galichia Heart Hospital. Claimant testified that he reported his continued symptoms to Mr. Bonds and a couple co-employees. Claimant's symptoms started at his belt line and went down to his right leg.

At the emergency room, claimant was examined and a lumbar MRI scan was ordered. The MRI scan was conducted on January 17, 2012, and revealed an L5-S1 disc herniation impinging on the right S1 nerve root. Claimant testified that his son, Chansamone Inthirath, who had accompanied claimant to the hospital, called respondent in claimant's presence and advised that claimant was at the emergency room and would not be returning to work. The person to whom claimant's son spoke and what else was said in that telephone conversation are unclear.

Claimant admitted that while serving in the military, his legs were wounded by shrapnel. The nature and extent of those injuries is not in the record. There was no evidence of other back or leg injuries or conditions prior to December 29, 2011.² However,

¹ P.H. Trans. at 10.

² *Id.* at 20-21.

there was evidence that claimant had problems with varicose veins before the accident and had undergone testing to determine if his varicose veins could be treated surgically.

Claimant's son, Chansamone Inthirath, testified that he drove his father to the emergency room on January 6, 2012, because claimant was complaining of pain in his right leg and was unable to drive. Claimant's son corroborated claimant's testimony regarding the call the son made to respondent on January 6, 2012.

Kelly Brand, a human resource assistant for respondent, testified that she had worked for respondent for 10 years. Ms. Brand testified that claimant requested FLMA paperwork on January 9, 2012, for blood clots in his leg. According to Ms. Brand, if claimant would have told her that he had been injured at work she would have handled the situation differently and claimant would not have been provided with FMLA papers. The completed FMLA paperwork was admitted into evidence at the preliminary hearing and it makes no reference to a work-related injury or injuries.

Robert Bonds, Jr., a maintenance supervisor for respondent, testified that he might have been working with claimant on December 29, 2011, or he could have been working with others. Mr. Bonds testified that at the end of each shift he prepared a report in which he would summarize what happened during that shift. Mr. Bonds testified that if claimant had complained about feeling an odd sensation in his back, he would have included that in his shift report. Shift reports prepared by Mr. Bonds on December 29 and December 30, 2011, and January 6, 2012, were admitted into evidence. None of the reports contain any reference to an accident or injury, however, the report for January 6, 2012, does make reference to complaints of leg pain and documents claimant's intention to go to the hospital.

Mr. Bonds testified that claimant had not shown up to work on December 30, 2011, and when claimant returned to work on January 3, 2012, claimant stated that he had visited the emergency room for blood clots in his legs.

Claimant was examined at his attorney's request by Dr. C. Reiff Brown on April 13, 2012. Claimant reported injuring his low back on at least three occasions while working for respondent between December 29, 2011, and January 3, 2012 through January 6, 2012. Claimant claims that these low back injuries occurred in the course of claimant's lifting duties with respondent. Dr. Brown diagnosed a herniation of the L5-S1 disc with nerve root impingement of the right. In Dr. Brown's opinion there was a causal connection between the conditions required by claimant's work and the resulting accident. Dr. Brown opined that the accident was the prevailing factor in causing the injury, claimant's present condition, and his present impairment.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501a(b) and (c) provides:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) provides:

'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(d), (f) and (g) provides:

(d) 'Accident' means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. 'Accident' shall in no case be construed to include repetitive trauma in any form.

(f) (1) 'Personal injury' and 'injury' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) 'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

Claimant alleges personal injury by accident on "12-29-11, 1-3-12 and each and every day through 1-6-12."³ The preponderance of the credible evidence supports claimant's allegations as found by the ALJ.

Claimant's testimony is not entirely clear regarding when he was injured and when he provided respondent with notice of his work-related injuries. It is likely that at least part of the lack of clarity resulted from language difficulties. The record seems clear that English is not claimant's first language and that the services of an interpreter were necessary for claimant to provide testimony and for him to understand the preliminary proceedings. Further confusion understandably resulted from the existence of symptoms in claimant's lower extremities due to vascular issues, which occurred at or near the same time as claimant's development of radicular symptoms from his lumbar disc herniation.

However, there is ample evidence supporting the occurrence of claimant's accidental injuries. Claimant's testimony supports his allegations of accidental injury which resulted from lifting an electric motor weighing approximately 150 pounds on at least one occasion. A claimant's testimony alone is sufficient evidence of his physical condition.⁴ Moreover, the definition of "prevailing" as it relates to the term "factor" in the New Act

³ Forms E-1 and E-3 filed on April 13, 2012.

⁴ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001).

requires that all relevant evidence, which would include claimant's testimony, shall be considered in making the prevailing-factor determination.

The hospital records from January 6, 2012, make reference to right low back pain radiating down the posterior thigh to the foot. Claimant gave a history of his symptoms beginning the day before January 6, 2012 and getting worse the day of admission. Claimant told the ER personnel that his work required him to lift and bend a lot and that "(Patient notes the possibility of an injury...does alot (sic) of lifting/bending at work)." ⁵ The diagnosis of the ER physician was acute right sided sciatica. These records are consistent with claimant's allegations of accidental injury.

Respondent points to no other potential cause of claimant's herniated disc other than the heavy lifting claimant described. There is no evidence that claimant's low back injury was the result of prior injuries, previous degenerative disease, or intervening trauma. Moreover, Dr. Brown expresses the only expert medical opinion in this record concerning causation. Dr. Brown concluded that there is a causal connection between the conditions required by claimant's work and the accident. Dr. Brown opined that claimant's accident was the prevailing factor causing the injury, claimant's condition, and his current impairment.

The ALJ had the opportunity to actually observe the four lay witnesses who testified at the preliminary hearing. Although the Board's review is de novo regarding issues which fall within its jurisdiction, including issues of credibility, it can be advantageous for the ALJ to actually see and listen to witnesses.

CONCLUSION

The undersigned Board member agrees with and adopts the ALJ's findings. Claimant did satisfy his burden of proof that he sustained personal injury by accident arising out of and in the course of his employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. ⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

⁵ P.H. Trans., Resp. Ex. 1 at 1.

⁶ K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 4, 2012, is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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Nelsonna Potts Barnes, Administrative Law Judge